BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JAIME RAYGOZA	)	
Claimant	)	
	)	
VS.	)	Docket No. 261,135
	)	
IBP, INC.	)	
Self-Insured Respondent	)	

ORDER

Claimant requested review of the March 25, 2003 Award entered by Administrative Law Judge Brad E. Avery. On September 4, 2003, the parties presented oral arguments to the Workers Compensation Board. The Director of the Division of Workers Compensation appointed Stacy Parkinson to serve as Board Member Pro Tem in place of Gary M. Korte, who recused himself from this proceeding.

APPEARANCES

Stanley R. Ausemus of Emporia, Kansas, appeared for the claimant. Gregory D. Worth of Roeland Park, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

In the March 25, 2003 Award, Judge Avery awarded claimant permanent partial disability benefits for a 25 percent functional impairment to the right upper extremity, including the shoulder. Claimant contends the Judge erred. Claimant argues, in addition to the right shoulder injury, he also permanently injured his neck and is, therefore, entitled to receive permanent disability benefits for an "unscheduled" injury. Claimant requests the Board to award him a 76 percent work disability (a disability greater than the functional impairment rating).

Conversely, respondent and its insurance carrier request the Board to affirm the Award. But if it is determined claimant suffered an "unscheduled injury" then respondent argues claimant's work disability should be 17 percent.

The only issue before the Board is the nature and extent of claimant's injury and disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The parties stipulated that claimant met with personal injury by accident arising out of and in the course of employment on November 13, 1999. Claimant began work for respondent on November 1, 1999, and was in a class training for approximately a week. Claimant then began his job which required he use a hook in his left hand and a hammer in his right hand to break cattle ribs. After performing that job for three days claimant reported a shoulder injury to his supervisor. Claimant was then provided light-duty work.

Claimant initially received conservative treatment with Dr. Hutchinson which consisted of medications, physical therapy and temporary work restrictions. Claimant was then referred for treatment and was first evaluated by Dr. Jeffrey T. MacMillan on February 1, 2000. Claimant's complaints were limited to his right shoulder and he had a normal range of motion with no complaints of discomfort in his cervical spine. Dr. MacMillan's initial diagnosis was right shoulder impingement syndrome.

An MRI revealed some changes in the supraspinatus tendon and some spurring on the undersurface of the acromial clavicular joint. Dr. MacMillan provided conservative treatment for the right shoulder which included cortisone injections into the shoulder. In March 2000, surgery was discussed but claimant declined and conservative treatment for the right shoulder continued. At his July 20, 2000 office visit, the claimant changed his mind and decided to proceed with surgery for his right shoulder.

On September 6, 2000, Dr. MacMillan performed a subacromial decompression on claimant's right shoulder to relieve the impingement syndrome. Post-surgical care included physical therapy for the right shoulder. In a follow-up visit on October 25, 2000, claimant first complained to Dr. MacMillan of neck pain and numbness as well as a pins and needles sensation running down the right extremity into the forearm. When the complaints persisted at the next office visit on December 20, 2000, the doctor ordered an EMG or nerve conduction study of the right upper extremity.

Dr. Vito J. Carabetta performed the nerve conduction study which indicated mild carpal tunnel syndrome and compression of the ulnar nerve at the wrist. Dr. MacMillan

concluded the study did not indicate impingement in the cervical region. Dr. MacMillan stated:

> Q. Would the EMG or nerve conduction study that was conducted be one which would detect impingement of nerves in the cervical region if that were present?
>
> A. Yes, could.
>
> Q. Was there any such finding on that study?
>
> A. No.[1]

When Dr. MacMillan performed a physical examination of claimant on January 26, 2001, the Tinel and Phalen's testing were negative and he was unable to confirm the results obtained from the study. The doctor further determined claimant had reached maximum medical improvement and based on the AMA *Guides,*[2] Dr. MacMillan rated the claimant with a 5 percent impairment to his right upper extremity at the level of the shoulder.

Dr. MacMillan opined the claimant did not have any permanent functional impairment to his cervical spine. And Dr. MacMillan did not rate the claimant's carpal tunnel or the Guyon's canal syndrome because it could not be confirmed by physical examination. Dr. MacMillan restricted the claimant from lifting or carrying greater than 20 pounds with his right upper extremity and that he avoid repetitive use of his right hand above shoulder level. On February 22, 2002, Dr. MacMillan added an additional restriction of no repetitive grip with his right hand.

Because of continuing complaints the claimant was referred and first examined by Dr. Carabetta on August 2, 2001. Dr. Carabetta's diagnosis was status post-right shoulder decompression acromioplasty and localized myofascial change in the upper trapezius region at the base of the neck. Following a course of trigger point injections, the doctor concluded claimant reached maximum medical improvement on October 9, 2001.

Based upon the AMA *Guides*, Dr. Carabetta rated the claimant with a 5 percent whole person impairment due to the regional myofascitis affecting the upper trapezius muscle region on the right side. The DRE method was implemented and referenced in Table 73, Category II. The doctor noted this rating would be in addition to the rating provided by Dr. MacMillan for claimant's right shoulder. Dr. Carabetta did not rate claimant for either the carpal tunnel or ulnar nerve because he noted that by the time he examined claimant the hand symptoms were gone. Dr. Carabetta restricted claimant from reaching

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[1] MacMillan Depo. at 15.

[2] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.).

above the right shoulder, occasional lifting or carrying of up to ten pounds, and frequent lifting or carrying of up to five pounds.

On December 6, 2001, at the request of his attorney, claimant was examined by Dr. Pedro A. Murati. Upon physical examination, Dr. Murati found claimant's shoulder had a negative rotator cuff, Hawkins and impingement on the right. Dr. Murati found trigger points in the right shoulder girdle extending into the cervical and thoracic paraspinals.

Dr. Murati diagnosed the claimant with the following: (1) right shoulder pain secondary to status post subacromial decompression; (2) right carpal tunnel syndrome; (3) right Guyon's canal entrapment; and, (4) myofascial pain syndrome affecting the neck, mid-back and right shoulder girdle.

Based upon the AMA *Guides*, Dr. Murati opined the claimant has a 10 percent right upper extremity impairment for right shoulder pain secondary to subacromial decompression; 3 percent right upper extremity impairment for the loss of range of motion in the right shoulder; 10 percent right upper extremity impairment for right carpal tunnel syndrome; 10 percent right upper extremity impairment for the Guyon's canal entrapment. Using the Combined Values Chart on page 322, Dr. Murati rated the claimant with a 29 percent right upper extremity impairment which converts to a 17 percent whole person impairment. Dr. Murati also rated the claimant's myofascial pain syndrome affecting the neck (4 percent) and mid-back (2 percent) for a combined 22 percent whole person impairment.

The ALJ ordered that claimant be examined by Dr. Peter V. Bieri for an opinion regarding the nature and extent of claimant's functional impairment. Claimant was examined by Dr. Bieri on April 22, 2002. The doctor's report noted:

> Examination of the cervical spine region revealed no visible or palpable muscle spasm at rest. There was no significant tenderness to palpation. No tissue atrophy was noted. Tenderness was elicited to palpation involving only the posterior shoulder itself, not the cervical spine region. Active range of motion of the cervical spine was judged full and unrestricted.[3]

Dr. Bieri opined claimant suffered a 25 percent permanent partial functional impairment to the right upper extremity at the shoulder. The doctor further commented:

> While the claimant has a diagnosis of myofascial pain, this is included in the above rating. This appears to primarily involve the posterior right shoulder, and is separate

[3] Bieri Report (Apr. 22, 2002) at 5.

> and distinct anatomically from the cervicothoracic spine. No additional permanent impairment is awarded to the spine itself.[4]

The workers compensation act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[5] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[6] The Board, as a trier of fact, must decide which testimony is more accurate and/or more credible and must adjust the medical testimony along with the testimony of the claimant and any other testimony that might be relevant to the question of disability.[7]

The first issue for determination is whether claimant suffered a scheduled or a non-scheduled disability. The Act recognizes two different classes of injuries which do not result in death or total disability. An injured employee may suffer a permanent disability to a scheduled body part or a permanent partial general disability.[8] It is the situs of the disability, not the situs of the trauma, that determines which benefits are available.[9] If the situs of the disability is to the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, the disability is considered a scheduled disability.[10]

The claimant was injured during the first three workdays he performed his job for the respondent. His complaints of pain were limited to his right shoulder for the first eleven months that he received medical treatment. The treating physician, Dr. MacMillan, concluded claimant did not have any permanent impairment in his cervical spine. The court ordered independent medical examiner also concluded claimant did not suffer any impairment in the cervical spine and limited claimant's permanent functional impairment to the right upper extremity.

Claimant argues that Dr. MacMillan never examined or treated his cervical spine. The doctor testified:

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[4] Id.

[5] K.S.A. 44-501(a).

[6] K.S.A. 44-508(g).

[7] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

[8] K.S.A. 44-510d; K.S.A. 44-510e.

[9] *Bryant v. Excel Corp.*, 239 Kan. 688, 722 P.2d 579 (1986).

[10] K.S.A. 44-510d(a)(13).

> Q. (By Mr. Ausemus) By the same token, Doctor, you made no effort to evaluate the neck and give any impairment rating for the pain and discomfort that he complained of extending into his neck; is that correct, sir?
>
> A. When Mr. Raygoza came to me, his complaints were of shoulder pain, not of neck pain, and he did not report any injury to his neck although he did describe some right-sided neck symptoms afterwards. He never had any physical examination findings of a cervical radiculopathy, so there was neither injury nor physical examination findings which would corroborate - - which would indicate that he had any need to have his neck examined.
>
> Q. Well, you didn't examine the neck; isn't that right sir?
>
> A. Well, indirectly we did with the electrical studies. As I pointed out earlier, the EMG and nerve conduction studies would demonstrate if there was evidence of a cervical radiculopathy.
>
> Q. Well, they were positive; is that not correct, sir?
>
> A. Not for a cervical radiculopathy.[11]

In the absence of complaints from the claimant or any objective findings from diagnostic tests it cannot be said there was a failure to examine or treat claimant's cervical spine.

Claimant next notes that Dr. Carabetta provided claimant treatment and concluded claimant had a permanent impairment to the cervical spine. However, Dr. Carabetta noted that claimant's complaints were primarily in the back part of the shoulder and he noted that from a medical perspective "we're dealing with the trapezius muscle region"[12] And Dr. Carabetta confirmed claimant had a normal range of motion of the cervical spine. Lastly, Dr. Carabetta agreed that during his treatment of claimant he had noted that claimant was concerned that if his condition improved it would affect his recovery on his workers compensation claim. Which, in turn, made the doctor somewhat skeptical about how successful treatment would be. Arguably even Dr. Carabetta confirmed the situs of claimant's myofascial pain syndrome was the trapezius muscle and, as noted by the court ordered independent medical examiner, such a finding is distinct from and does not include the cervicothoracic spine.

Lastly, Dr. Murati also found permanent impairment to claimant's cervical spine. On cross-examination he explained his rating was based upon a specific table in the AMA *Guides*. He noted:

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[11] MacMillan Depo. at 26-27.

[12] Carabetta Depo. at 27.

Q. Looking at your finding of impairment in the cervical and thoracic region, the only injury you diagnosed there was one of myofascial pain syndrome?

A. That's right.

Q. The reference you're making is coming from page -- I'm sorry, page 113, and table 75 of the guides for that diagnosis of injury to the cervical and thoracic spine?

A. That's right.

Q. Table 75 is blocked into four different sections, correct?

A. Yes.

Q. Is your rating coming from section 2 there?

A. Section two, subsection B.

Q. All right. And amongst the defined characteristics of that sort of injury, is the presence of rigidity for both the cervical and thoracic spine, correct?

A. Yeah, medically documented pain and rigidity, yes.

Q. You found Mr. Raygoza to have a normal range of motion of both the cervical and thoracic fine, [sic] did you not?

A. Yes.

Q. You did not find the rigidity there?

A. No. No there is -- rigidity doesn't mean full range of motion.

Q. What is your definition of rigidity, Doctor?

A. Rigidity is when you have increased tone that did not allow flowing range of motion.

Q. So even though his range of motion was full, you're telling us that it was somehow restricted?

A. No, it's not restricted -- well, it's -- by having these trigger points you cannot force the -- you can obtain full range of motion if you stretch the neck slowly. You cannot do it in a fast fashion because what you'll have is the trigger point will contract and not allow that, but if you do it slowly enough, you can obtain full range of motion. That's what I mean by rigidity.[13]

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[13] Murati Depo. at 34-36.

And Dr. Murati also rated claimant for carpal tunnel and Guyon's even though both treating physicians as well as the court ordered independent medical examiner had concluded claimant no longer was suffering from those symptoms. Lastly, the Board notes that when examining Ms. Terrill's task list the doctor became quite animated that her listing was not accurate or was even dishonest because in his experience some of the jobs could not be performed as written. Unfortunately, Dr. Murati was reviewing the tasks from the perspective that they were being performed by a right-hand dominant individual, however, claimant was left-hand dominant.

The ALJ concluded claimant's impairment was limited to a scheduled disability to the right shoulder and the Board agrees. The Board concludes the medical opinions of claimant's treating physician, orthopedic surgeon, Dr. MacMillan, and the court appointed independent medical examining physician, Dr. Bieri, are more persuasive and convincing, in this case, than the other medical opinions. Therefore, considering the opinions of both Drs. MacMillan and Bieri, the Board finds that claimant's award for the work-related injury should be limited to a scheduled disability to claimant's right upper extremity including the shoulder and not a whole body disability.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated March 25, 2003, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of September 2003.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Stanley R. Ausemus, Attorney for Claimant
Gregory D. Worth, Attorney for Respondent
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director